debt. Here, when the respondents threatened to sue Malbina Sdn. Bhd. by January 31, 1978, both the appellants were not directors of the company. Nor was there any evidence to indicate that they were in any way connected with the company at the material time. Secondly, learned counsel for the appellants argued that the letter dated April 28, 1978 (see page 50 of the record) and addressed to the respondents was a request for a "temporary" overdraft of $50,000.00 and not for a "continuing" overdraft facilities. Lastly, it was contended by learned counsel for the appellants that if the appellants were to be held legally liable their liability should be limited to the maximum sum of $50,000.00 only.

The learned judge did not appear to attach any legal significance to the differences between "temporary" and/or "continuing" overdraft and therefore did not seem to have considered them in his judgment. However, the learned judge disposed of these submissions in this manner:

"Paragraphs 11 and 13 of enclosure 21 set out the circumstances in which the 5th and 6th defendants (the appellants in this appeal) came to be guarantors and demonstrate without challenge that the consideration for the guarantee was forbearance to sue and the allowing of the principal borrower to continue to use the overdraft facility. The bank statements exhibited show that the principal debtor was allowed to increase the amount outstanding from $94,374.07 on May 8, 1978 to $132,979.13 by May 31, 1978 which increase was effected after the execution of the guarantee by the 5th and 6th defendants ..."

In our judgment, the appellants had succeeded in raising serious questions of law which merited mature consideration. The issues could more appropriately be decided by way of the hearing of a preliminary issue without a full trial with witnesses. For these reasons, we disagreed with the learned judge and gave unconditional leave to the appellants to defend the action.

Appeal allowed.

Solicitors: *Majid, Krishna, Menon & Lee; Tunku Zuhri, Manan & Abdullah.*

ABDUL GHAPUR BIN HAJI SALLEH v. TUN DATUK HAJI MOHAMED ADNAN ROBERT, YANG DI-PERTUA NEGERI SABAH & 7 ORS.

[O.C.J. (Abu Mansor J.) March 20, 1986]

[Kota Kinabalu – Originating Summons No. 27 of 1986]

Constitutional Law – State Legislative Assembly – Dissolution of – Challenge to its validity – Application for declarations – Whether third to seventh defendants were government officers – Whether injunction could issue against them to conduct general election – Federal Constitution, art. 113 – Sabah Constitution, arts. 10 & 21(4) – Government Proceedings Ordinance, 1956, s.29(2) – Chief Minister (Incorporation) Ordinance, s.5 – Evidence Act, 1950, s.4(3).

By originating summons dated March 1, 1986, the plaintiff applied for four declaratory reliefs, to the effect that the dissolution of the Sabah State Legislative Assembly was null and void and of no effect and that the third to eighth defendants were not entitled to act under article 113 of the Federal Constitution and call or conduct a general election under article 21(4) of the Sabah Constitution. In the present application, the plaintiff sought an injunction to restrain the third to eighth defendants by themselves or by any person acting on their behalf from acting under article 113 of the Federal Constitution upon the Proclamation of Dissolution until the hearing and disposal of the main summons. The plaintiff claimed that there were serious questions to be tried. Summons against the fifth defendant was struck out, thus leaving seven defendants in the originating summons. It was submitted on behalf of the third to seventh defendants that an injunction is not available to the plaintiff as under section 29(2) of the Government Proceedings Ordinance, 1956 no injunction could be granted against an officer of the Government if the effect of granting the injunction or making the order would be to give relief against the officers which would not have been obtained in proceedings against the Government.

Held, dismissing the plaintiff's application: (1) the dissolution of the Legislative Assembly of Sabah by the first defendant under article 21(2) of the State Constitution was a legislative act and not an executive act. The Proclamation was *prima facie* valid until declared otherwise, and the clear duty of the Election Commission could only be to hold an election within the prescribed period. In the public interest or in the interest of justice, the court exercised its discretion and refused to issue an injunction against the third to seventh defendants;

(2) the third to seventh defendants were in the employment of the Federal Government and there could not be other interpretation as their salaries were paid by the government.

Cases referred to:

(1) *Tengku Hj. Jaafar & Anor.* v. *Government of Pahang* [1978] 2 M.L.J. 105.
(2) *Tio Chee Hing* v. *Government of Sabah* [1981] 1 M.L.J. 207.
(3) *American Cyanamid* v. *Ethicon Ltd.* [1975] A.C. 396.
(4) *N.W.L. Ltd.* v. *Woods* [1979] 3 All E.R. 614.

(5) *Cayne & Anor.* v. *Global Natural Resources* [1984] 1 All E.R. 225.
(6) *Smith* v. *Inner London Education Authority* [1978] 1 All E.R. 411.
(7) *Tun Datu Haji Mustapha bin Datu Harun* v. *Tun Datuk Haji Mohamed Adnan Robert & Anor.* [1986] 2 M.L.J. 391, 393.
(8) *Hoffman-La Roche* v. *Secretary of State for Trade & Industry* [1975] A.C. 295.
(9) *Government of Malaysia* v. *Zainal bin Hashim* [1977] 2 M.L.J. 254 affirmed by P.C. [1979] 2 M.L.J. 276.
(10) *U Po Naing* v. *Burma Oil* (1929) L.R. 56 I.A. 140.
(11) *K.C. Cheah* v. *Petronas* [1987] 1 M.L.J. 25.
(12) *Tan Sri Haji Othman Saat* v. *Mohamed bin Ismail* [1982] 2 M.L.J. 177.
(13) *Tun Datu Haji Mustapha bin Harun* v. *Tun Datuk Haji Mohamed Adnan Robert & Anor. (No. 2)* [1986] 2 M.L.J. 420.
(14) *Cormack* v. *Cope & Anor.* (1974) 131 C.L.R. 432, 471.

APPLICATION.

Gopal Sri Ram (*Dr. Yaacob Hussain Merican* and *Dr. Tunku Sofia Jewa* with him) for the plaintiff.

Anthony Lester Q.C. (*Dominic Puthucheary* and *Miss Josie D. Bosi* with him) for the 1st and 2nd defendants.

Miss Mary Lim Thiam Suan (Federal Counsel) for 3rd to 8th defendants.

Cur. Adv. Vult.

Abu Mansor J.: By his Originating Summons dated March 1, 1986, supported by his affidavit sworn on February 28, 1986, the plaintiff applied for four declaratory reliefs as follows:

(1) That the Instrument of Dissolution dated February 24, 1986, executed by the 1st defendant dissolving the Sabah State Legislative Assembly (announced by the 2nd defendant on February 26, 1986) is null and void and of no effect.

(2) That the Sabah Legisalative Assembly has not been dissolved notwithstanding the acts of 1st and 2nd defendants.

(3) That notwithstanding the purported dissolution referred to in Prayer 1, the Sabah State Legislative Assembly continues.

(4) That the 3rd, 4th, 5th, 6th, 7th and 8th defendants are not entitled to act under article 113 of the Federal Constitution and call or conduct a general election under article 21(4) of the Sabah Constitution.

By *ex parte* Summons-in-Chambers of even date the plaintiff also applied to restrain the 3rd to 9th defendants by himself or by any person acting on his behalf from acting under article 113 of the Federal Constitution upon the Proclamation of Dissolution until the hearing and disposal of the main Summons. The Summons-in-Chambers came up for hearing on March 1, 1986, and I ordered that all defendants be served and adjourned it to March 12, 1986, for full arguments in Chambers.

The plaintiff's application for the injunction is supported by the plaintiff's second affidavit (2A) sworn on February 28, 1986. In paragraph 4 of (2A), the plaintiff gave four grounds in applying for the interim injunction against the 3rd to 8th defendants. They were:

(a) There is a serious question to be tried in the main action. Under this heading the plaintiff alleged that the issue raised in the main Originating Summons is the constitutionality of the actions of the 1st and 2nd defendants in dissolving the Sabah Legislative Assembly. Plaintiff contended that the dissolution or purported dissolution of the Legislative Assembly announced on February 26, 1986 is null and void and of no effect. That being so the plaintiff says that the 3rd to 8th defendants are therefore not bound to act on that declaration of dissolution. The plaintiff's counsel urged on the Court to find that there are raised several factual issues as to whether the 1st defendant was advised by the 2nd defendant to dissolve the Assembly. As evidenced, he says, by paragraphs 5 to 7 in Enclosure (7), the affidavit sworn by the 1st defendant, the 1st defendant says he was advised and requested whereas as reported, in "AGHS-8" in Enclosure (3), a press release by the 2nd defendant, no mention was made of any request. Plaintiff's counsel urged on this Court to consider the importance of this fact in view of the requirement of the Sabah State Constitution, article 10(1) that 1st defendant should act on advice in the exercise of his functions under the Constitution and that the 1st defendant may exercise his discretion only in article 10(2)(b) and article 10(4) thereof. Learned counsel further urged that there has in fact been admission by the 1st defendant he had acted on the 2nd defendant's advice.

(b) The next serious question to be tried according to plaintiff's counsel is a question of law. If the 1st defendant has a discretion whether to

accede to a request to dissolve but instead acted on advice it becomes a case of abdication or surrender of discretion, plaintiff's counsel urged.

(c) Thirdly, whether in dissolving the Sabah Legislative Assembly while the issue as to who is the real Chief Minister (in Civil Suit No. K.467 of 1985 – judgment on April 15, 1986 [1986] 2 M.L.J. 420) is still under a cloud amounts to a breach of the doctrine of the separation of powers – an encroachment by the Executive upon the Judicial powers of the Federation and consequently plaintiff says void.

(d) Then fourthly, whether the Election Commission is under a constitutional duty to act upon *any* proclamation of dissolution or only a valid and constitutional dissolution. These issues, the plaintiff's counsel submitted merit mature consideration, require argument and careful consideration and are matters not to be summarily dismissed.

As the application was primarily directed against the 3rd to 8th defendants, though affecting the rights of the 1st and 2nd defendants, counsel for the 3rd to 8th defendants was asked to reply first. In the course of her submission, Miss Mary Lim, counsel for 3rd to 8th defendants, correctly pointed out that the 5th defendant is not a member of the Commission. On her application and conceded to by the plaintiff's counsel the summons against the 5th defendant was struck out with costs to him and the Court substitutes the 5th defendant to 7th defendants for 6th to 8th respectively.

Counsel for the 3rd to 7th defendants submitted that an injunction is not available to the plaintiff on the ground that under section 29(2) of the Government Proceedings Ordinance no injunction could be granted against an officer of the Government if the effect of granting the injunction or making the order would be to give relief against the officers which would not have been obtained in proceedings against the government.

She referred the Court to the definition of "officer" in the definition section of the said Ordinance which in relation to government *includes* (emphasis mine) a person in the permanent or temporary employment of such government which includes Federal or State Government. She also referred us to section 7 of the Election Commission Act (Act 31), Bundle (D4), pages 54 and 55, where the members of the Election Commission are deemed to be public servants within the meaning of the Penal Code. Also referred to is the Ninth Description in section 21 of the Penal Code as to what a "public servant" denotes and also to the definition of officer in the Interpretation and General Clauses Ordinance, 1948, as meaning a person in the permanent or temporary employment of any government. She urged on the Court by analogy the Judges of the High Court like the members of the Commission can also be regarded as "officers" of the government though both having been appointed by the Sovereign, both independent of each other and of the government – the Executive having no right to give instruction to either of them.

In the present application, she submitted, it was unlike an application directly against the government as in *Tengku Hj. Jaafar & Anor.* v. *Government of Pahang*[1] when it was said injunction could be granted but not granted therein against the government. The Plaintiff's application coming under section 29(2) of the Government Proceedings Ordinance, a stricter provision than section 29(1), cannot be granted as section 29(2) prohibits the Court from granting any injunction against an officer of the government if the effect of which is to give relief against the government which the plaintiff could not have obtained against the government. Counsel cited authority No. 1 to No. 4 in Bundle D4 in supporting her argument that no such injunction can be obtained.

In the course of the argument learned counsel for the 3rd to 7th defendants also applied for the Originating Summons against them be struck out as, she submits, the summons discloses no cause of action against them for other than identifying them as defendants there are no paragraphs or pleadings against them. Counsel claimed she was entitled to make the oral application under 0.12, r.7, of the Rules of the High Court. She went on to submit such an action had been taken in the case of *Tio Chee Hing* v. *Government of Sabah*[2] and a similar order was given in Federal Court Civil Appeal No. 274 of 1984. She submitted as no cause of action is disclosed the Originating Summons against the 3rd to 7th defendants ought to be struck out.

Mr. Lester for 1st and 2nd defendants submitted that although primarily the injunction sought is against the 3rd to 7th defendants nonetheless it cannot be denied that if granted the effect in substance is tantamount to a mandatory interlocutory injunction against the 1st and 2nd defendants; in

effect setting aside the proclamation for dissolution which order the plaintiff could not have against the 1st defendant or 2nd defendant. Mr. Lester also made a few other preliminary observations to the effect that on the serious triable issues the Court in applying the *American Cyanamid* v. *Ethicon Ltd.*[3] principle may have regard also to special or special factor cases in which the degree of probability of success of the plaintiff's claim is a factor to be weighed in the balance of convenience or in the public interest or that of justice consideration. (See *N.W.L. Ltd.* v. *Woods,*[4] *Cayne & Anor.* v. *Global Natural Resources*[5] and *Smith* v. *Inner London Education Authority*[6]).

On the question of whether the 1st defendant was entitled to treat the 2nd defendant as the Chief Minister as regards the dissolution of the Legislative Assembly counsel for the 1st and 2nd defendants submitted that it is not a serious triable issue to be tried because plaintiff lacks the *locus standi* to be so retried. To order so would only result in duplicity as that issue had been fully canvassed before my brother, Datuk Tan Chiaw Thong J.

There remains only the alleged "delayed dissolution issue" which he submitted is not seriously triable since the two days' delay in announcing the 1st defendant's decision to dissolve the Assembly cannot be said to have prejudiced the plaintiff as 90 days is allowed by the State Constitution. In reply to Mr. Sri Ram's allegation that the 1st defendant acted on advice or discretion and there is conflict of evidence, Mr. Lester submitted no such conflict exists. From 1st defendant's affidavit (7), Paragraph 6, 7 and 16, it was clear, he submitted that 1st defendant did not act on advice alone but in fact from Enclosure (9) it was advice and request. The 2nd defendant said he advised and requested while 1st defendant says he acted under article 10(2) and article 21 independently and not acting under advice of 2nd defendant.

In reply to what the plaintiff submitted under the heading A item 2 of his written submission on the question to be tried, if the dissolution was the 2nd defendant's decision, Mr. Lester submitted there was no evidence before the Court to support the allegation that the 2nd defendant advised the 1st defendant to dissolve the Sabah Assembly in order to defeat plaintiff's claim in Civil Suit No. K. 467 of 1985 (*Tun Datu Haji Mustapha bin Datu Harun* v. *Tun Datuk Haji Mohammed Adnan Robert & Anor.*[7], judgment referred to). It was further contended that it was mere allegation that the 1st defendant acted as a rubber stamp. Mr. Lester says the only evidence if at all as to rubber stamp is the press release, "AGHS-8" in Enclosure (3).

As to the issue whether the 1st defendant was entitled to treat the 2nd defendant as Chief Minister when his appointment is still under a cloud, reverted to in plaintiff's submission under the heading A item 3, Mr. Lester answers that the 2nd defendant's gazetted appointment under section 5 of the Chief Minister (Incorporation) Ordinance, and by section 4(3) of the Evidence Act 1950 (read with section 5 of the said Ordinance) in the absence of bad faith or misconstruction of 1st defendant's power, is conclusive proof of his appointment. No evidence shall be allowed to disprove that the 2nd defendant's appointment was duly made. This is coupled by the fact that at the time of dissolution no Court had finally determined that 2nd defendant is not Chief Minister and he also submitted that it is to be presumed that official and judicial acts are rightly and regularly performed. Apart from example (E) to section 114, Mr. Lester also cited the judgment of Lord Diplock in *Hoffman-La Roche* v. *Trade Secretary*[8] at pages 101 and 102 of Bundle (B) D2 stating there is a presumption in favour of an order's validity prevailing so long as there is no final judgment in that action to the contrary.

In regard to Mr. Sri Ram's citation of C.J. Barwick's statement that the act of dissolution was an Executive act (page 118 of Bundle (P1), Mr. Lester pointed to the Court that C.J. Barwick's statement was a minority statement whereas the majority view that it was Legislative is at pages 471 and 472 of that case and in the judgment of Menzies J. at page 461 and that of Gibbs J. at page 467.[14]

As for the allegation of usurpation of the Court's powers in particular my brother, Datuk Justice Tan Chiaw Thong J.'s decision, Mr. Lester submitted there is no usurpation. In dissolving the Legislative Assembly of the State of Sabah the 1st defendant was acting in his own sphere and in Datuk Tan J. deciding the issues of facts and law which had been placed before him he would be deciding within his jurisdiction with powers to reward the winner and punish the loser. If the plaintiff in that main case succeeds his reputation and the reputation of his witnesses will be vindicated. If however the defendant succeeds the 1st and 2nd defendants and his witnesses will be vindicated. It is not denied, he says, that the holding of an election may deny the plaintiff in that case (Tun Mustapha) from being Chief Minister if the order of the Court says so but

he may be still so by the peoples' vote. It has happened that an Executive act or Legislative act may deprive the fruits of proceedings but it is not usurpation. He cited a few instances such as *Government of Malaysia* v. *Zainal's*[9] case, *Burma Oil*[10] case and *K.C. Cheah* v. *Petronas.*[11] Mr. Lester also commented that it is unmeritorious on plaintiff's part to make this application as Tun Mustapha as the person alleged to be affected did not proceed with the appeal and did not join the plaintiff to seek relief. He submitted that the 1st defendant was fully entitled to treat 2nd defendant as Chief Minister and referred to Enclosure (9), paragraph 4.

As to Ground 5 of the plaintiff's submission, Mr. Lester submits that as other points will not merit serious triable issues so Ground 5 would also not arise. He submits that on all grounds there are no serious questions to be tried based on *American Cyanamid's* test.

Lastly Mr. Lester questioned the *locus standi* of the plaintiff to bring this suit. He cited *Tan Sri Hj. Othman Saat* v. *Mohamed bin Ismail*[12]. He submitted the plaintiff is a stranger and had no genuine interest and the Court has been urged to consider that authority.

On the question of balance of convenience, Mr. Lester submitted that the application of *American Cyanamid*[3] is qualified by two important considerations of the 'special cases." The Court should evaluate the respective merits of both parties. Will the grant of an interlocutory injunction finally and effectively decide the Originating Summons itself?

He submitted that the present application comes into the "special case" and the Court should consider the balance – the likelihood whether the plaintiff would succeed bearing in mind the time factor of 90 days for the Election Commission to hold election. If plaintiff is granted the interlocutory injunction it will finally decide the Originating Summons for the reason that one of the premises on which this injunction is founded is the allegation that the 2nd defendant is not the lawful Chief Minister. This question had been canvassed in full in the trial before Datuk Tan Chiaw Thong J. having taken 3½ months comprising 500 pages of submissions and 1000 pages of written evidence. Counsel submitted it is unreasonable and unrealistic to say that the issue would be resolved before Datuk Tan J.'s judgment on April 15, 1986, (see *Tun Datu Haji Mustapha bin Datu Harun* v. *Tun Datuk Haji Mohamed Adnan Robert & Anor. (No. 2)*[13]). In the case of the Election Commission he submitted the protracted Court hearing including appeals will make it impossible for the Election Commission to hold the election within the 90 days as proclaimed. If granted plaintiff would have had all the relief obtained in the main action as it would then have effectively prevented the Election Commission from performing its work. Counsel cited *N.W.L. Ltd.* v. *Woods*[4] Bundle D2 page 127, 128 and 133 and said there would be nothing more left for the 1st and 2nd defendants to proceed to trial.

Mr. Lester submitted that in the *Cayne* v. *Global Natural Resources* case[5] type page 108 and page 115 of (D2) balance of convenience would no longer have to be weighed. The test is what can the Court do in its best endeavour to avoid injustice? Counsel submitted that in the present case the *Cayne* and *N.W.L.* type of consideration would apply.

Mr. Lester also submitted that if the Court rules against him on the above submissions he refers to paragraphs 27 and 28, Enclosure (7), which enumerates the reason why a balance of convenience is against granting the relief prayed for.

In deciding whether to grant this relief counsel also submitted that the Court is to weigh public interest as was done in *Smith* v. *Inner London*[6] and since the plaintiff is seeking an injunction against a public authority to prevent it from performing its public duty the consideration need not only be balance of convenience but also the wider public interest of good government and the stability of the State Government of Sabah. One factor of weighing in the public interest he submitted is the discretionary power vested in the 1st defendant. He has explained why he dissolved. In considering balance of convenience this should weigh heavily against granting relief and the court would be reluctant to grant one as plaintiff had not suffered damage. He submitted that as regards plaintiff wanting to preserve the *status quo* he did not seek to preserve the *status quo* but *status quo ante*, the position before the proclamation.

Finally Mr. Lester submitted that the plaintiff's application for an injunction is affected by laches not in the sense that he was late in his application but that the plaintiff had acquiesced to the 2nd defendant's appointment as Chief Minister since April 22, 1985. In Enclosure 9, paragraph 9, it is alleged that the plaintiff had acquiesced and

supported him. Plaintiff had never shown that 2nd defendant was not the Chief Minister and that the 1st defendant would not regard him as one.

He submits that this is another reason why the interlocutory relief should be refused.

Mr. D. Puthucheary on behalf of the 1st and 2nd defendant submitted that he adopted submission of counsel for the 3rd to 7th defendants relating to jurisdiction of the Court to grant injunction under section 29 of the Government Proceedings Ordinance. He stressed that the words "government" and "officer of government" were capable of larger concept and wider interpretation and not limited to officers in the Executive position only. Mr. Puthucheary also submitted that the reason for the Federal Court allowing the appeal of the Federal Counsel in the Federal Court Civil Appeal No. 274/84 was that no injunction could be issued against a government or the process of government. In the present case although the date for election had not been fixed but the Election Commission, as in Enclosure (6), Exhibit "JDB-1", had stated that election would be about May 10 or 11. He also drew a difference in the filling of a casual vacancy by the 3rd to 7th defendants as opposed to the situation following a dissolution which shall be filled by 90 days.

In reply Mr. Sri Ram submitted that as to the 3rd – 7th defendants' counsel's application to have the summons struck out she should have applied by summons in order to give the plaintiff notice and as for the cause of action the Originating Summons is the pleadings. He relies on Enclosure (2A) why the injunction is sought principally against 3rd – 7th defendants since they should not act on an invalid dissolution. They cannot enquire but the Court can do so and grant an injunction until the question is resolved.

On jurisdiction to grant injunction Mr. Sri Ram submitted it is available against the government and for "government" we have a definition and whether the Election Commission members are officers of government or a part of government is an open question. In reply Mr. Sri Ram said the five grounds he relied on are not the only grounds but are part of his grounds. Essentially the plaintiff's case is that he is an Assemblyman and he is seeking a declaration that the Assembly had not been constitutionally dissolved by acting on an advice of a Chief Minister whose title is disputed. Then whether the proclamation is valid. Briefly what the plaintiff contends as well is that the dissolution is a nullity due to date of announcement and fettering of discretion and discretion is invalid.

Mr. Sri Ram drew a distinction between those cases such as the *Burma Oil* case,[10] *Government of Malaysia* v. *Zainal Hashim's* case[9] – Bundle D1 page 352 *supra*, and *K.C. Cheah* v. *Petronas*[11] in that those cases were cases where a party's right had been destroyed by a Legislative act. In the present case, plaintiff is taking a challenge that the dissolution is void. As for unmeritorious allegation what plaintiff is saying is that the 1st defendant has no power to grant a delayed dissolution and he had abdicated his discretion. As for the objection to plaintiff's *locus standi* Mr. Sri Ram submitted his client was the Assemblyman and he is entitled to say that the Assembly still subsists – and not dissolved. On balance of convenience and allegation that if granted there will be left nothing to try the prime consideration should be to prevent the 3rd – 7th defendants from proceeding on an unconstitutional dissolution and plaintiff alleges what is supreme is observation of the Constitution and abiding by the law. As for the allegation of laches plaintiff did not come then because he did not have the evidence of a dissolution – it was then speculative. Plaintiff submits that he has made out a *prima facie* case for an injunction.

CONCLUSION

Firstly before anything else I would like to clear the oral application made by counsel for 3rd – 7th defendants to have the Originating Summons struck out against them. I refer to the counsel's application. It is clear under the order sought by her such application should be made by summons for reason that the plaintiff should have notice of such a serious step being taken against him. Indeed in the case quoted by learned counsel the application made was under 0.25 r.4 of the Rules of Supreme Court 1957 which now is 0.18, r.19, of the current High Court Rules 1980. As for counsel's contention that there was absence of pleadings I agree with plaintiff's counsel that Prayer 4 of the Originating Summons Enclosure (1) is the pleadings – the declaration plaintiff is seeking. The 1st and 2nd defendants raised the question of *locus standi* of the plaintiff to bring this action and the question of laches. On the question of *locus standi* I agree with the submission of plaintiff's counsel that he has one since he was a member of the Sabah State Assembly which was directly affected by the proclamation dissolving the State Assembly which he applies to be declared void. He is affected by the order of dissolution directly.

On the question of laches as was pointed out by Mr. Lester, counsel for 1st and 2nd defendants, it is not laches in bringing this action late that is complained of by the plaintiff but it is delay in bringing the issue of 2nd defendant's title to the office and he acquiesced to his appointment on plaintiff's part and in blowing hot and cold in respect of his support for him. As my decision on this application for the injunction turns on other points I find it not necessary that I should decide on the matter raised.

On the delayed dissolution issue I agree with Mr. Lester's submission bearing in mind that election could take place in 90 days, that no injustice is caused anybody by a delay of two days.

Before I proceed to discuss the substantial application for injunction I must remind myself that I have been asked to exercise a discretionary power. Such a discretion is to be judicially exercised based on well-known principles.

I have to remember that the application is only against the 3rd to 7th defendants, members of an Election Commission. It has not been asked for against the 1st and 2nd defendants. Nonetheless, as pointed out by their counsel, Mr. Lester, in submission, if the injunction is granted in substance, though not in form, it would have the effect of a mandatory injunction against them to which I agree and it cannot be more clear. What I must also remember is in this application I am far from trying this substantive matter and that being so I must refrain from saying any thing which has the effect of pronouncing any judgment on the issues being discussed which must be done and can only be done when these issues are properly tried. In other words I am not to prejudge the issue.

What has the plaintiff to show if he were to succeed in his application for this injunction? In *American Cyanamid's* case he has to show that the claim is not frivolous or vexatious and there are serious questions to be tried.

According to plaintiff's submission the first question he posed is whether in dissolving the Assembly the 1st defendant had to act on advice or had a discretion in the matter. The second question the plaintiff alleged to be triable is that if the defendant has a discretion whether to accede to a request to dissolve but instead acted on advice then it becomes a case of abdication or surrender of discretion.

To my mind the answer to the two above questions lies in the interpretation of the relevant articles. I find as a fact that from the affidavits of 1st defendant, Enclosure (7) and 2nd defendant, Enclosure (9) there was advice and request to have the Legislative Assembly of the State of Sabah dissolved. 1st defendant deposed that he used his discretion and acted independently. It cannot be denied that the 1st defendant can exercise his discretion to withhold consent under article 10(2) of the Sabah Constitution. The article plainly speaks for itself. Is the 1st defendant to agree right away if there was advice or a request to have the Assembly dissolved? If he is then it can be said he has no discretion but article 10(2) says so plainly he has a discretion to withhold consent. In my view the proper construction to be put to it would be he would have to consider, as he is vested with that power to do, whether to agree or to withhold consent. In his search for that decision he is of course not debarred from consulting anyone and obtaining the best advice and that in doing that consultation and obtaining that advice, 1st defendant in no way abdicated or surrendered that discretion. The decision will still be his and his alone. The people he consults do not decide for him and how can it be said he surrendered or abdicated. On the analogy of a Court proceeding when one calls for expert witnesses they do not substitute the Court it is the Court that makes the decision.

As for the third question whether the 1st defendant is obliged to act on advice, this I have answered in my consideration of the second question and since the 1st defendant was not obliged the other part of the question does not arise.

Plaintiff also says there is triable issue in the fourth ground advanced by him in that as the question as to who is the real Chief Minister is presently being considered by a judicial power of the Federation (judgment due to be delivered on April 15, 1986); the dissolution being an Executive act, according to plaintiff there is a triable issue that the dissolution is an encroachment of judicial powers.

Is the dissolution of the State Legislative Assembly of Sabah an Executive act? According to the majority view of this case, *Cormack* v. *Cope & Anor.*[14], it is Legislative. In that case Stephen J., at page 471 said:

". . . but I may say that I would regard the acts of the Governor-General, undertaken in pursuance of S.57, in dissolving both Houses and in convening a joint sitting as

different in character from the familar Executive acts of the Governor-General in Council which were said by the Plaintiffs to be analogous and which were relied upon in that way as justifying judicial intervention in this instance. Both the act of dissolving both Houses and that of convening a joint sitting are undertaken not much in the exercise of the Executive power vested by S.61 as in performance of a power conferred by S.57 upon His Excellency as personal designata and inextricably involved in a Legislative process . . . . . S.57 lays down a complex procedure lying well within the ambit of Legislative process . . . "

Following this authority I am satisfied that dissolution of the Legislative Assembly of Sabah by the 1st defendant under article 21(2) of the State Constitution is a Legislative act and not an Executive act and that is consistent with the 1st defendant's position in Sabah Constituion article 13 which provides that the Legislature of the State shall consist of the 1st defendant and the Legislative Assembly. If I am right in holding that the act of dissolution is a Legislative act in no way can the Court intervene and that there is therefore no triable issue that there was encroachment. I have but to agree with the submission of counsel for the 1st and 2nd defendants that Datuk Justice Tan Chiaw Thong's Court and the 1st defendant were proceeding in each other's sphere undeniably in this case with the unfortunate result that if the plaintiff, in Datuk Tan Chiaw Thong J's court, be successful he may be robbed of the fruits of that judgment but most important consideration to remember being that in no way affects the validity of the 1st defendant's proclamation of dissolving the Assembly which is valid and cannot be interfered with by any Court injunction (*Cormack* v. *Cope, supra*). Having held that the 1st defendant's dissolution was an act in his own sphere it is then unnecessary to dwell on the fifth reason of the plaintiff whether the Election Commission is under a constitutional duty to act upon the proclamation. The answer can only be the 3rd to 7th defendants have no choice but to act.

It is my decision therefore that there are no serious triable issues to go to trial for reasons given above. In the exercise of my discretion I therefore hold that no interlocutory injunction be issued against the 3rd – 7th defendants. In case that I should be in error in my above finding that there are no serious triable issues I proceed to consider whether or not I should issue an interlocutory injunction against the 3rd – 7th defendants on the balance of convenience. In whose favour does the balance of convenience lie?

In answering this question I am satisfied that the present case falls in one of the "special" or "special factor" cases that qualify or is an exception to the *American Cyanamid* principles. I say so because of the time factor of 90 days within which election is to be held under article 21(4) of the State Constitution following the dissolution of the Assembly and also the issue of the right Chief Minister, in this Originating Summons, which happens to be also the litigated issue, the subject matter of Civil Suit No. K.467 of 1985. Although the decision in Civil Suit K.467/85 will be delivered on April 15, 1986, it is unrealistic to say that the issue will be or can be resolved within the 90 days bearing in mind that trial took 3½ months and with records of 1,000 pages of Notes of Evidence and 500 pages of written submissions. It is not unreasonable to expect that the decision on April 15, 1986, would not end there and on appeal the records would have to be prepared and got ready. The Court would have to take judicial notice that that issue will not be resolved within the 90 days allowed to the Election Commission to hold the elections. In the meantime if the injunction is granted against the 3rd to 7th defendants they will be dragged in uncertainty. If the plaintiff fails the clear result will be the 1st and 2nd defendants and the people of Sabah would have lost the opportunity of taking part in a lawful election. It would give the plaintiff the relief that he would be able to obtain in the main action.

In this connection it may be relevant to consider the balance of convenience following the test of *Smith* v. *Inner London Education Authority*[6] on the need to weigh public interest since the plaintiff is seeking an injunction against the 3rd – 7th defendants, members of a public authority. The injunction although against them in substance affects the 1st and 2nd defendants and the exercise of a discretionary power under the State Constitution by the 1st defendant. In this case it may also be relevant to consider the prospect of the plaintiff's succeeding. It is correct statement, I think, that the proclamation, until it is finally declared null and void, and it is not likely to be so declared in 90 days as stated above, has to be presumed valid as was stated by Lord Diplock in *Hoffman-La Roche* v. *Secretary of State for Trade & Industry*.[8] That being the case the chance of plaintiff succeeding in the main action in my view is slim. That being so the plaintiff therefore cannot show that he has a real prospect of success. The interest of the public therefore outweighs and this application can only result in refusal to grant the relief sought for.

As my view of the proclamation is that it is *prima facie* valid, until it is declared otherwise, in the face of that finding the clear duty of the Election Commission can only be to hold an election within the prescribed period. Since it is the clear duty of 3rd to 7th defendants what reason can the Court give for issuing an order preventing the 3rd to 7th defendants from performing their clear constitutional duty? In the public interest or in the interest of justice I exercise my discretion and refuse to issue an injunction against the 3rd to 7th defendants.

If I am still in error the next question will be has the Court the jurisdiction to issue this injunction against the 3rd to 7th defendants? That leads me to consider whether the 3rd to 7th defendants are officers of the government. Miss Mary Lim, counsel for the 3rd to 7th defendants, citing various authorities, contended they are and therefore under section 29(2) of the Government Proceedings Ordinance 1956 no injunction could be given against them as the effect would be giving the plaintiff relief which he could not have obtained against the government. Mr. Sri Ram, counsel for plaintiff, contended they are not also after citing several provisions of the Federal Constitution. Alternatively, even if they are so on the authority of *Tengku Haji Jaafar* v. *Government of the State of Pahang*[1] nonetheless injunction can be granted.

I rule they are officers of government and in my view they cannot be otherwise. The slight confusion occurs because the statute creating that body or department has given them certain privileges and restricts the appointees to a certain category of persons that seems to set them apart from members of the public service. That their funds they utilise be charged on the Consolidated Fund is to give them a certain degree of independence so that their salary would not be subject to the discussion of Parliament unless the Act which created them is properly under discussion. Stripped of all that they are officers in the employ of the Federal Government. The definition of "officer" in the Government Proceedings Ordinance in relation to a government includes a person in the permanent or temporary employment of such government. It cannot be denied that the 3rd to 7th defendants are in the employment of the Federal Government. In my view there cannot be other interpretation as their salaries are paid by the government.

An injunction has been asked for when none can be given. For reasons I have stated above, I exercise my discretion that no injunction can be granted against the 3rd to 7th defendants and I therefore dismiss the plaintiff's application for injunction against 3rd to 7th defendants with costs.

Application dismissed.

Solicitors: *Hj. Mohamed Noor, Dr. Yaacob & Ismail.*

BANK BUMIPUTRA MALAYSIA BHD. v. THE INTERNATIONAL TIN COUNCIL & ANOR.

[O.C.J. (V.C. George J.) January 13, 1987]

[Kuala Lumpur – Civil Suit No. C23-1206-86]

Practice and Procedure – Writ filed in Malaysia – Order for service thereof out of jurisdiction in London on 1st defendant – 1st defendant enjoys immunity from being sued in England – Money claim against 1st defendant – Claim for tin against 2nd defendant – Claim against both defendants for declarations for right to tin – Application by 1st defendant to set aside order granting leave for service outside jurisdiction – R.H.C. 1980, O.11, r. 1 - Courts of Judicature Act, 1964, s. 23.

The plaintiff bank issued a writ against the International Tin Council (ITC) as the 1st defendant and Datuk Keramat Smelting Sdn. Bhd. as the 2nd defendant. ITC is an organization established as a result of agreement arrived at among various countries, one of which is Malaysia. ITC has its headquarters in London and enjoys immunity from being sued in England. The plaintiff bank through its London branch had provided banking facilities to ITC. The plaintiff bank alleged that as at March 10, 1986, there was due and owing to it from ITC the sum of £76,127,721.29 in respect of such facilities. It was also alleged that ITC had provided a continuing security by a pledge upon (i) goods delivered by ITC or its agents to the bank or its agents and (ii) warrants, delivery orders and all documents of title to goods deposited with the plaintiff bank. The plaintiff contended that ITC had deposited with it a number of tin warrants issued by the 2nd defendant on the sale of tin referred to therein; such tin apparently should be in the possession of the 2nd defendant in Penang. The plaintiff bank contended that by virtue of the pledge by ITC, the plaintiff bank was entitled, on the failure to meet the demand of the amount owing, to possession of the tin in respect of which the warrants were issued. Hence, the plaintiff bank claimed, *inter alia*, as against both defendants, declarations to the effect that the plaintiff bank had a right to the tin. The 2nd defendant has delivered a defence.

The plaintiff bank was given leave to serve the writ on ITC outside the jurisdiction in London. ITC entered a conditional appearance and now applies to have the order granting such leave set aside, alternatively for such leave to be restricted by exclusion of the plaintiff bank's claim for £76,127,721.29, interest and damages.